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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

No. 1067

PHILIP W. WRIGHT,
Petitioner

v.

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

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PHILIP W. WRIGHT,
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v.

COMMONWEALTH OF VIRGINIA,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF VIRGINIA

Petitioner prays that a Writ of Certiorari issue to review the judgment of the Supreme Court of Appeals of Virginia entered the 14th day of October, 1969, denying a Petition for a Writ of Error and Supersedeas to a judgment rendered by the Corporation Court of the City of Newport News, on

the 25th day of March, 1969, in a prosecution by the Commonwealth of Virginia against the Petitioner, Philip Wright, for a misdemeanor (Warrant No. 9715), affirming the judgment of the said Corporation Court convicting the Petitioner of selling one untitled, black and white allegedly obscene motion picture film.

OPINIONS BELOW

The decision of the Supreme Court of Appeals of Virginia denying the Petition for a Writ of Error and Supersedeas is unreported, notice thereof is printed herein at Appendix, page 12. The opinion and judgment of conviction of the Corporation Court for the City of Newport News, is unreported and appears in the record pages 182 through 199, and is printed herein at Appendix page 13.

JURISDICTION

Jurisdiction of this Court is invoked under Title 28, United States Code, Section 1257, (No. 3), and Part V of the Rules of this Court.

QUESTIONS PRESENTED

The Constitutional Questions to be presented by this Petition for Writ of Certiorari, all of which were presented to the Court and urged in the Petition for Writ of Error to the Supreme Court of Appeals of Virginia, are as follows:

(1) Is the untitled, black and white motion picture film protected by the First Amendment to the Constitution of the United States of America, as applied to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, from prosecution as an allegedly obscene film when it is not sold to minors, is not advertised obstrusively, or pandered?

(2) Is the untitled, black and white motion picture film protected by the First Amendment to the Constitution

of the United States of America, as applied to the State of Virginia by the provisions of the Fourteenth Amendment to the Constitution of the United States of America, as material which is not utterly without redeeming social value and material which is not patently offensive and material which would not appeal to the purrient interest of the average member of society and material which does not exceed the community standards of tolerance in contemporary materials?

CONSTITUTIONAL PROVISIONS

AMENDMENT ONE

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, of of the press, or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

AMENDMENT FOURTEEN

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction equal protection of the laws.

STATEMENT OF FACTS

On October 19, 1968, at approximately 4:15 P.M., Officer W. W. Raines, of the Newport News, Virgnia, Police Department at the Village Book Store in the City of Newport News, Virginia, purchased from the Petitioner, Philip Wright, among other things, a black and white, untitled motion picture film, (record page 13). The Village Book Store did not allow minors in their premises, (record page 11, 19). The

untitled, black and white motion picture film was submitted to Sergeant Spanos of the Newport News Police Department, who thereafter obtained a warrant for the arrest of the Petitioner, (record page 25, Warrant No. 9715). The Petitioner was arraigned on February 11, 1969, charged with violating Section 18-1-228 of the Virginia Code, (Appendix P. 12), before the Honorable Douglas M. Smith, Judge of the Corporation Court for the City of Newport News, and Petitioner entered a plea of not guilty, (record page 4, 5). The Petitioner had been convicted in the Municipal Court of Newport News on November 18, 1968 on the warrant and had appealed for trial de novo to the Corporation Court.

At the non jury trial, the black and white, untitled motion picture film was viewed by the Court and the witnesses, (record page 24), and thereafter Dr. G. O. Roberts, a sociologist, testified that said film appealed to the prurient interest in sex (record page 37), and that the film was patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters (record page 38, 39). On cross-examination Dr. Roberts acknowledged that in his prior testimony given at the trial of the Petitioner in the Municipal Court for the City of Newport News on November 18, 1968, he had stated that the black and white, untitled motion picture film was not "utterly" without socially redeeming value and that it had a possibility of some value (record page 51), asserting that he had the right to change his opinion at this stage of the proceedings, (record page 52, 54).

The State next presented Dr. Thorbjorn J. Lassen, a psychiatrist, who testified, without any consideration of community standards relating to the description or representation of sexual matters in comparable material, that the dominant theme of the black and white, untitled motion picture film taken as a whole appealed to the prurient interest in sex (record page 63 through 68), and that the film had no social or redeeming value. Upon cross-examination the witness admitted that his understanding of the

term "Prurient interest in sex" was not an abnormal interest in sex but merely an exciting or stimulating interest (record page 70).

The Petitioner moved the Court for an acquittal at the close of the Commonwealth's case in chief (record page 79) which Motion to Strike was denied by the Court (record page 123) following which the Petitioner presented the testimony of David H. Jones, a Doctor of Philosophy teaching at William and Mary College (record page 128), who was of the opinion that the black and white, untitled motion picture film would not go beyond the community standards of tolerance and was comparable to other materials nationally distributed (record page 130, 132), and that it has socially redeeming value (record page 136).

The Petitioner then called Dr. Wilbert A. Hammond, a Psychiatrist in private practice in the State of Virginia and on the Staff of the John Howard Division of St. Elizabeth's Hospital in Washington, D.C., who voiced his opinion that the untitled, black and white motion picture film would not appeal to the prurient interest of an average person (record page 141), and that the film would not appeal to the purrient interest of the homosexual (record page 142). He compared the untitled, black and white motion picture film to "girly magazines" (record page 144 through 148), and he was of the opinion that the film did not go substantially beyond the limits of candor in depicting sexual matters. Upon cross-examination, Dr. Hammond stated that the material would not appeal to the prurient interest of the normal individual (record page 165), even though it was crude and trash (record page 157, 159).

Petitioner then called as a witness, Russell T. Norman, a Doctor of Psychology and a Professor at William and Mary College and the Director of the Student Counseling Center, who expressed his opinion that the untitled, black and white motion picture film did not exceed the limits of candor tolerated by the community (record page 167), and that it

had socially redeeming value and did not appeal to the prurient interest (record page 168 through 170).

Upon the close of all of the testimony, the Petitioner again moved the Court to strike the evidence and to grant an acquittal (record page 178 through 180). The Corporation Court noted the similarity between the material involved in this prosecution and other materials which were held to be not obscene by the Supreme Court of the United States, which basic similarity was acknowledged by the prosecuting attorney (record page 180). On March 25, 1969, the Corporation Court rendered its opinion and judgment convicting the Petitioner (record page 183 through 198), and fixing his punishment at a fine of $500.00, plus costs of Court. Thereupon the Petitioner duly filed a Notice of Appeal (record page 189), and petitioned the Supreme Court of Appeals of Virginia to issue a Writ of Error and Supersedeas, which Petition was denied by the Supreme Court of Appeals of Virginia on October 14, 1969.

REASONS FOR ISSUING THE WRIT

(1) Is the untitled, black and white motion picture film protected by the First Amendment to the Constitution of the United States of America, as applied to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, from prosecution as an allegedly obscene film when it is not sold to minors, is not advertized obtrusively, or pandered?

The untitled, black and white motion picture film is expression protected under the First Amendment to the Constitution of the United States of America, as applied to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, as interpreted by the Supreme Court of the United States of American in the cases of *Redrup v. New York, Austin v. Kentucky*, and *Gent v. Arkansas*, 386 U.S. 767, 87 S.Ct. 1414, 18 L.Ed. 2d 515. In that opinion this Court, Per Curiam, reaffirmed its prior definition of obscenity in *Roth v. United States*,

354 U.S. 476, as clarified in *Memoirs v. Massachusetts,* 383 U.S. 413, and subsequent decisions, and appended three qualifications:

(1) Protection of juveniles;

(2) Assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to the materials;

(3) Pandering of the materials.

The testimony in the Corporation Court of Newport News, Virginia which was uncontradicted, proved that the Village Book Store and the Petitioner, did not allow minors in their premises (record page 11, 19); the Corporation Court in its opinion (record page 184), noted that there was no obstrusive advertising by the Village Book Store and the Petitioner, and that there was no business done with minors. The record is devoid of any proof or suggestion of pandering of any type. Following the *Redrup* decision this Court has granted Certiorari, and/or review in more than 20 cases coming before the Court and summarily reversed the findings of obscenity, including *Ratner v. California,* 388 U.S. 442 (motion picture film "Honey Bee"); *Cobert v. New York,* 388 U.S. 443 (motion picture films "Jane Palmer Number 2", "M. Jorden" and "Jayne Tracy"); *Schackman v. California,* 388 U.S. 454 (Girlie pictures in coin operated peep shows: D-15, O-12, O-7, B-1 and B-19); the latest of which is *Carlos v. New York,* ____U.S. ____, Number 524, decided December 8, 1969, reversing 24 NY 2d 865, 301 NYS 2d 96, wherein the New York Court of Appeals had held the questioned material to be "hard core pornography".

This Court's recent decision in *Stanley v. Georgia,* 394 U.S. 557, further supports the Petitioner's position herein by reiterating the concern that, "Obscene material might fall into the hands of children . . . or . . . it might intrude upon the sensibilities or privacy of the general public," 394 U.S. at 567, "No such dangers are present in this case." Of course the *Stanley* case dealt with an admittedly hard core pornographic motion picture film, depicting sexual action by couples, which is absent from the constitutionally protected film under consideration upon this Petition. There-

upon, the Petitioner argues that the Supreme Court of Appeals for the State of Virginia erred in refusing to accord the untitled, black and white motion picture film the constitutional immunity from prosecution provided by the First Amendment to the Constitution of the United States of America, as applied to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, and in failing to issue its Writ of Error and Supersedeas to the Corporation Court for the City of Newport News, Virginia.

(2) Is the untitled, black and white motion picture film protected by the First Amendment to the Constitution of the United States of America, as applied to the State of Virginia by the provisions of the Fourteenth Amendment to the Constitution of the United States of America, as material which is not utterly without redeeming social value and material which is not patently offensive and material which would not appeal to the purrient interest of the average member of society and material which does not exceed the community standards of tolerance in contemporary materials?

Petitioner argues that the untitled, black and white motion picture film is entitled to the protection of the First Amendment to the Constitution of the United States of America, as applied to the State of Virginia by the Fourteenth Amendment to the Constitution of the United States of America, since the Commonwealth of Virginia failed to prove by responsible evidence that said film would appeal to the prurient interest of the average member of the community. The testimony of Dr. Thorbjorn J. Lassen, a psychiatrist, who testified for the State, was that the film appealed to the purrient interest in sex (record 65, 67). Upon cross-examination the witness admitted that his understanding of the term "prurient interest in sex" was not an abnormal interest in sex, but merely an exciting or stimulating interest (record page 70). This Court is propounding the definition of obscenity in *Roth v. United States*, 354 U.S. 476, indicated that the material must appeal to the pru-

rient interest in sex, not just a normal interest in sex. The Corporation Court of Newport News, Virginia, in rendering its decision, acknowledged that the State's expert witness did not include a correct definition of "prurient interest" and "did not fit the definition as laid down by the Supreme Court of the United States", (record page 193). There was a vacuum in the testimony upon which the finding of obscenity was made to float, unsupported by evidence. The record reveals that Dr. G. O. Roberts, a sociologist, who was a witness for the Commonwealth of Virginia acknowledged in his testimony in the Corporation Court of Newport News that he had been of the opinion, when testifying in the Municipal Court of the City of Newports News on November 18, 1968, that the black and white, untitled motion picture was not "utterly" without socially redeeming value, asserting that the witness had a right to change his opinion at the latest stage of the proceedings (record page 51, 52, 54). This Court in *Roth v. United States*, 354 U.S. 476, App. footnote 14 stated "all ideas having even the slightest redeeming social importance, unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the guarantees, unless excludeable because they encroach upon the limited area of more important interest". This holding had been reiterated in the decision of *Memoirs v. Massachusetts*, 383 U.S. 413, wherein materials which are not utterly without redeeming social value were declared to be Constitutionally protected. The Commonwealth of Virginia at no time attempted to prove to the Corporation Court of Newport News, Virginia, what materials constitute the national community standard of tolerance for comparable material, nor did the State attempt to prove what materials constituted the community standards for the State of Virginia or even for the City of Newport News, Virginia. Thereupon the Petitioner's conviction should not be allowed to stand, *Hudson v. U.S.* 234 A.2d 903, *U.S. v. Klaw*, 350 F.2d 155. The Petitioner introduced an expert witness Dr. David H. Jones, a Doctor of Philosophy and a professor at William

and Mary College, who testified that the untitled, black and white motion picture film would not go beyond the community standards of tolerance and was comparable to materials nationally distributed (record page 130, 132), and had socially redeeming value (record page 136). Another witness for the Petitioner, Dr. Wilbert A. Hammond, a Psychiatrist in private practice in the State of Virginia and on the Staff of the John Howard Division of St. Elizabeth's Hospital, Washington, D.C., voiced his opinion that the untitled, black and white motion picture film would not appeal to the prurient interest of the average person and did not go substantially beyond the limits of candor in sexual matters in literature (record page 144 through 148). Another witness for the Petitioner, Dr. Russell T. Norman, a Doctor of Psychology and a professor at William and Mary College, expressed his opinion that the untitled, black and white motion picture film did not exceed the limits of candor tolerated by the community (record page 160), and that the film had socially redeeming value and did not appeal to the prurient interest (record page 168 through 170). The finding of obscenity herein, without any basis in the evidence could only be grounded on prejudice. The Corporation Court for the City of Newport News in its concluding remarks before taking the case under advisement stated "Gentlemen, I'm going to think about it, of course . . . I pretty much know I think what the Supreme Court of the United States would do, but I'm going to think about it because I'm going to go against my conscenience to give a stamp of approval of this mess. But when I wear the robe, I have to follow the law, so I . . . I'm not going to render an opinion at this time, and I'll let you know in writing what I'll do with it, in due course, and I'll let you . . . take this material, because I don't . . . need it for my opinion". Ours is a government of laws not of men; a decision based solely upon prejudice cannot be permitted to stand. The First Amendment to the Constitution of the United States of America will not suffer this intolerable limitation on the freedom of expression and a Writ of Certiorari should issue.

First Amendment to the Constitution of the United States of America will not suffer this intolerable limitation on the freedom of expression and a Writ of Certiorari should issue.

CONCLUSION

In consideration of the two questions raised by this Petition it is respectfully submitted that a Writ of Certiorari to the Supreme Court of Appeals of Virginia should issue, thereby guaranting to the management of a book store that deals only with adults, under non-obtrusive circumstances, without pandering of erotic material which could not be classified as hard core pornography, the protection from prosecution afforded by the First Amendment to the Constitution of the United States of America as applied to the individual states by the Fourteenth Amendment to the Constitution of the United States of America, and thereupon reverse the conviction of the Petitioner, Philip Wright.

Respectfully submitted,

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STATUTORY APPENDIX

CODE OF VIRGINIA
CRIMES AND OFFENSES GENERALLY

Article 3.

Obscenity.

* * *

§ 18.1-228. Production, publication, sale, possession, etc., of obscene items.—Every person who knowingly:

(1) Prepares any obscene item for the purposes of sale or commercial distribution; or

(2) Prints, copies, manufactures, produces, or reproduces any obscene item for purposes of sale or commercial distribution; or

(3) Publishes, sells, rents, lends, transports in intrastate commerce, or commercially distributes or exhibits any obscene item, or offers to do any of these things; or

(4) Has in his possession with intent to sell, rent, lend, transport, or commercially distribute any obscene item, shall be guilty of a misdemeanor. (1960, c. 233.)

* * *

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday *the* 14th *day of* October, 1969.

The petition of Philip Wright for a writ of error and supersedeas to a judgment rendered by the Corporation Court of the City of Newport News on the 25th day of March, 1969, in a prosecution by the Commonwealth against the said petitioner for a misdemeanor (Warrant No. 9715), having been maturely considered and a transcript of the record of the judgment aforesaid seen and inspected, the

court being of opinion that there is no reversible error in the judgment complained of, both reject said petition and refuse said writ of error and supersedeas, the effect of which is to affirm the judgment of the said corporation court.

A Copy,

Teste:

Howard G. Turner, Clerk
By R. P. Tomlinson
Deputy Clerk

TRANSCRIPT OF RECORD

VIRGINIA: IN THE CORPORATION COURT FOR THE CITY OF NEWPORT NEWS

Stenographic report of all the testimony, together with all the motions, objections and exceptions on the part of the respective parties, the action of the Court in respect thereto, and all other incidents during the trial of the case of Commonwealth vs. Philip W. Wright, tried in the Corporation Court for the City of Newport News, Virginia on February 11, 1969, before the Hon. Douglas M. Smith, Judge of said Court.

– – – o0o – – –

PRESENT:

Mr. Willard M. Robinson, Junior, Attorney for the Commonwealth.

Mr. Louis Ellenson, Attorney for the Defendant.

– – – o0o – – –

Schneider Reporting Co.
227 - 27th Street
Newport News, Virginia

COURT: All right, let the record show the Commonwealth Attorney is present. The Defense Counsel, Mr. Ellenson is present, and the Defendant, Philip Wright is present.

"On February 11, 1969, the Defendant was tried on three warrants charging him with violating Title 18.1-228 of the 1950 Code of Virginia, as amended, the Defendant having appealed from his conviction in the Municipal Court. The Court heard the evidence and argument of Counsel and now after having reviewed the evidence and having again reread all the authorities submitted by the Commonwealth Attorney and the Defense Counsel, I am prepared to render my decision which will be filed with the warrants.

"There were no cases cited by either the Commonwealth or Defense Counsel from the Virginia Supreme Court. All of the cases cited as authority relied on were Federal Court decisions and most of them from the Supreme Court of the United States.

"I will set forth briefly the facts in this case, none of which are in conflict except the testimony offered by the experts. On October 9, 1968 at approximately 4:15 p.m. Police Officer W. W. Raines, dressed in plain clothes entered the Village Book Store located at 3410 Washington Avenue, Newport News, Virginia. The Officer testified that there were two display window areas in front of the building in which were displayed paperback 'novels.' There was nothing of an obscene nature displayed in these windows that could be seen by the general public. There is a marquee over the front of the store with the words 'books and movies' which said marquee is lighted. The front door is recessed back from the sidewalk and on this door is written the words 'Adults Only' in letters six to eight inches tall and the words being eighteen to twenty inches in length. Inside the door on the north wall of the store there are paperback 'novels' and in the center of the store there are magazine cases containing paperback 'novels' and nude magazines. On the south wall are magazines which front covers display nude femals and

males. Over the top of the racks on the south wall there are movie film. On the back wall there are other paperback 'novels' and then there is a back room in which are located coin-operated movie machines some of which display pictures of nudes on the machines.

"Officer Raines picked out the two magazines in evidence before this Court to-wit: 'Sweet Sixteen' and 'Tiger Number Three' and obtained the film from an employee of the store. He took his purchases to the Defendant, Wright, who took them and placed them in a bag and gave them to the Officer and took the Officer's money. 'Sweet Sixteen' cost $3.50, 'Tiger Number Three' $3 and the film $12. It is well to mention that the film had no name on it but did have the price tag and the fact that it was two hundred feet and in black and white. There was Scotch taped to the film box the picture of the nude 'Star' which box and picture are in evidence. There was no conversation had between Officer Raines and the Defendant.

"The magazines were introduced into evidence and Sergeant Spanos of the Detective Bureau showed the movie film in Court and it is also in evidence. The Defendant by Counsel makes no legal objection regarding illegal search and seizure, the legality of the warrant and does not question the arrest procedure. As stated before the conflict in the evidence arises in the opinion of the experts who took the stand for the Commonwealth and for the Defendant.

"The Defense Attorney at the outset of the case made a motion that the Virginia Statute Section 18.1-228 was unconstitutional. This motion was overruled and the Court will not discuss that question further.

"The Virginia Statute relied on in this case is Section 18.1-228 as amended, the pertinent part of which is as follows: 'Every person who knowingly sells any obscene item shall be guilty of a misdemeanor.'

"The Statute says every person who 'knowingly sells.' Therefore the first question involved is did the Defendant

know the type of material that he was selling. The Court feels that this question must be answered in the affirmative.

"The Defendant was working in the Village Book Store which has been described earlier in this opinion. This in and of itself would lead even the most naive person to recognize the material that was being sold in this store. The magazine 'Sweet Sixteen' has on its cover the words 'The Magazine of Teen-age Nudes' and a picture of a nude male with his genital area showing as well as two nude males on the back of the magazine. 'Tiger Number Three' has the language 'The Male In Color' and shows a nude male on the front with his genital area showing and a side view of a nude male on the back of the magazine. Surely no one needs to open these magazines to know what the inside contains. This brings us to the film which as stated has no title but does have the photograph of a nude female lying on the bed with her legs spread apart and her complete genital area exposed. No one could successfully argue they thought this film contained a movie of Little Bo Peep, particularly when bought in the surroundings described earlier.

"Therefore the Court has no difficulty in ruling that the Defendant knowingly sold this material and knew the contents thereof.

"This brings us to the constitutional question involving the First Amendment to the Constitution of the United States which states in essence 'Congress shall make no law . . . abridging the freedom of speech, or of the press . . .' Under the due process clause of the Fourteenth Amendment the First Amendment would also apply to the States.

"In Roth against U.S., 354 U.S. 476 (1957) the Court made it clear that obscenity is not protected by the First Amendment of the Constitution of the United States. This is the opinion of seven of the nine Justices but there is disagreement among the seven as to what is to be classified as obscene so as not to be protected by the First Amendment.

"In the Roth case, the Court further states that obscenity should be restrained as is reflected in international agreements of over fifty nations and in the obscenity laws of the forty-eight states (now fifty) and twenty obscenity laws enacted by the Congress of the United States at the time of the Roth decision in 1957.

"Therefore it is apparent that the Virginia State Legislature feels that pornography can induce a type of sexual conduct which they deem obnoxious to the moral fabric of society or that it has an eroding effect on moral standards.

"However it is further clear from the Roth decision that obscene material does not have to create a clear and present danger of antisocial conduct or probably induce its recipients to such conduct.

"Therefore the real issue in this case is whether the magazine 'Sweet Sixteen' and 'Tiger Number Three' and the movie film are obscene.

"The magazine 'Sweet Sixteen' is called 'The Magazine of Teen-Age Nudes.' This magazine page after page shows the genital area of the male and in several pictures has two males together with one or two holding another nude male or with two males with their arms around each other. This magazine without a doubt is for the sole purpose of showing the genital parts of the male. 'Tiger Number Three' is a magazine which contains pictures in the most part of single male nudes with the dominant theme being that of the male genital area. The film that was show in Court was of a female who disrobed on the bed with the only prop in the barren room being that of the bed. The film is in black and white and without sound. This film shows close ups of the genital area with the female moving in motion on the bed both while on her back and on her stomach and also while in a kneeling position with her buttock area facing the camera. As stated above the female is constantly in motion and performing in different positions.

"In Roth against U.S. and subsequent cases it appears that the majority of the Court hold that material is obscene when (1) the dominant theme of the material taken as a whole appeals to the average person's prurient interest in sex (2) the material is patently offensive because it affronts the contemporary standards of the community relating to the description of representation of sexual matters and (3) the material is utterly without redeeming social value. Prurient interest as described in Section 18.1-227 of the Virginia Code, which the Court feels is the same as a definition observed by the Federal Court, is 'A shameful or mobid interest in nudity, sex or excretion.' This Court will apply these tests to this case.

"The experts produced by the Commonwealth and by the Defense of course disagree on this material. Doctor George O. Roberts who was called on behalf of the Commonwealth testified that in his opinion the movie does appeal to the prurient interest and does affront the contemporary standards of the community and it is utterly without redeeming social value. Doctor Roberts said that the magazine 'Sweet Sixteen' and 'Tiger Number Three' appeals to the prurient interest with some reservation but did testify that it was an affront to the contemporary standards but that the magazines may possibly have social value. Doctor T. J. Lassen testified that the magazines had no social value and appealed to the prurient interest of the average person. He did not attempt to answer the question as to whether or not any of the material affronts the contemporary standards of the community. As for the movie he also stated that it was utterly without redeeming social value and that the dominant theme appeals to the average person's prurient interest. However, Doctor Lassen's definition of prurient interest as brought out on cross examination did not fit the definition as laid down by the law.

"The three experts used by the Defense stated that none of the material appealed to the average person's prurient interest, that the material does not affront the contemporary

standards of the community and that the material is not without redeeming social value.

"As the trier of fact I am judging each magazine and film as a whole and as it would affect the average person applying contemporary community standards, or whether this material would offend the common conscience of the community by present day standards.

"First, does this material taken as a whole appeal to the average person's prurient interest, that is, a shameful or morbid interest in sex. This Court feels that it does. For instance, we are told by all of the well known authorities that we should not teach our children that sex is something shameful, dirty or morbid. They should be taught that sex is something beautiful in a relationship between a man and a woman. It is something that is natural and wholesome. This Court is mindful that sex and obscenity are not synonymous and that obscene material deals with sex in a manner appealing to the shameful or morbid interest. This Court feels that these magazines and film certianly appeal only to the shameful and morbid interest in nudity.

"Is this material patently offensive because it affronts the contemporary standard of the community relating to the description and representation of the sexual matters. The Court again feels that it does.

"Judge Learned Hand, in U.S. against Kennerly 209 F. 119 stated 'Should not the word obscene be allowed to indicate the present critical point in the compromise between candor and shame and which the community may have arrived here and now.' Obsenity should be subjected to the social sense of what is right—the established standard. This Court feels that some Courts should stop burying their heads in the sand as to what is the majority standard of average people in this country. Some Courts have gone too far interpreting the rights of individuals under the amendments of the Constitution of the United States. This Court feels that if the framers of those amendments known as the Bill of Rights knew that such material as presented to this

Court would be protected under the First Amendment to the Constitution they would turn over in their graves.

"If this material is not offensive to the contemporary standards of the community why are the articles placed by the Defendant in a paperbag. When one buys McCall, Look or Life the proprietor of the store does not conceal the purchase in a paper bag. I submit that the reason that these materials were placed in a paper bag was because the seller did not want the purchaser to have to walk down the streets of this city without them being concealed. This type of material would not be found in any doctor's, dentist's or lawyer's waiting room as reading material. This is the type of material that one covers up while in public and peruses in private. It is time that the Courts heed the outcries of the people in this country. It is evident to anyone who will read and listen to the news that the majority of average citizens do not tolerate this material.

"The third test is this material utterly without redeeming social value. This Court heard no evidence from any witness who took that witness stand as to the social value of these magazines and film. Three of the Defense 'experts' stated that it was not utterly without redeeming social value but they did not testify as to what value it had. Surely no one can compare this material with a Picasso, a Rodin or a Michaelangelo. This material cannot by any stretch of the imagination be called art, and declaring it obscene certainly does not interfere with the communication of ideas. It is utterly without redeeming social value.

"While it is quite apparent that movies are becoming more and more immoral in their handling of sex, that the TV industry is moving more and more toward liberalization in their handling of sex and the Federal Courts are becoming more liberal in their interpretation of obscenity, this Court will not lend its stamp of approval to the type of material introduced in this Court. I do not believe that the ruling that I am giving today should in any way cause concern to those who are true artists in the real sense of the word or to

any material that would have social value.

"I am therefore finding the Defendant, Philip Wright guilty as charged in all three warrants and I am fixing his punishment in the warrant involving the film at a fine of five hundred dollars plus costs; in the warrant charging the sale of 'Sween Sixteen' 30 days on the City Farm suspended on payment of cost and in the warrant charging selling of 'Tiger Number Three' 30 days on the City Farm suspended upon payment of costs. The Court is suspending the time because it does not feel that the employee of this establishment is the real culprit in these cases."

All right, sir, I'm sure you'll want to appeal, Mr. Ellenson.

MR. ELLENSON: Yes sir, your Honor.

COURT: I will stay the execution for a period of 60 days and I'll be glad to give you two copies of my opinion, one for you and one for you to send Mr. Dietz.

MR. ELLENSON: If your Honor please, I'd like to—I except to the ruling of the Court as being contrary to the law and the evidence and note our appeal.

COURT: Note your exception.

(The case was then concluded.)

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